SUPREME COURT, U. S.
FILED
JUN 25 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 283

THE JOHN KLANN MOVING AND TRUCKING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

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TABLE OF CONTENTS.

Opinions Below ---- 1

Jurisdiction ---- 2

Questions Presented ---- 2

Statutes Involved ---- 3

Statement of the Case ---- 4

A. Board Proceedings ---- 4

B. The Decision of the Court of Appeals ---- 8

Reasons for Granting the Writ ---- 9

Conclusion ---- 13

Appendices:

A. Opinion of the Sixth Circuit Court of Appeals ---- 14

Order of the Sixth Circuit Court of Appeals ---- 18

B. Decision and Order of the National Labor Relations Board ---- 19

C. Conflicting Decision of the Tenth Circuit ---- 22

D. Conflicting Opinion of the Seventh Circuit ---- 28

TABLE OF AUTHORITIES.

Cases.

Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) ---- 12, 13

Hawkins v. N.L.R.B., 358 F.2d 281 (7th Cir. 1966) ---- 12

Illinois Ruan Transport Corporation v. N.L.R.B., 404 F.2d 274 (8th Cir. 1968) ---- 12

Modern Motor Express, 149 N.L.R.B. 147 (1964) ---- 10

N.L.R.B. v. Auburn Rubber Company, 384 F.2d 1 (10th Cir. 1967) ---- 2, 12, 22

N.L.R.B. v. Challenge-Cook Bros., 374 F.2d 147 (6th Cir. 1967) ---------- 9

Raley's, Inc., 143 N.L.R.B. 256 ---------- 10

Ramsey v. N.L.R.B., 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964) ---------- 2, 12, 28

Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955) ---------- 6, 12

United Steel Workers of America v. American Manufacturing Co., 363 U.S. 564 (1960) ---------- 13

United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960) ---------- 13

United Steel Workers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574 (1960) ---------- 13

Statutes.

National Labor Relations Act, as Amended:

Sec. 7 ---------- 3

Sec. 8(a)(1) ---------- 3, 6, 12

Sec. 8(a)(2) ---------- 12

Sec. 8(a)(3) ---------- 6

Sec. 10(a) ---------- 3, 11

Sec. 10(e) ---------- 2

Sec. 201 ---------- 3, 11

Sec. 203 ---------- 4

28 U.S.C. 1254(1) ---------- 2

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit.

The John Klann Moving and Trucking Company, Petitioner herein, prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Sixth Circuit entered in this case on May 9, 1969, granting enforcement of an Order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. A, *infra*, pp. 14-18) is reported at ____ F.2d ____, 71 L.R.R.M. 2196. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 170 N.L.R.B. No. 133 (App. B, *infra*, pp. 19-21). Trial Examiner's Decision is set forth in full in the Record (304a-323a).[1]

[1] Figures with the "a" suffix refer to the appendix record filed on behalf of both parties in the court below.

The following opinions appear to conflict: *N.L.R.B. v. Auburn Rubber Company,* 384 F.2d 1 (10th Cir. 1967) (App. C, *infra,* pp. 22-27). *Ramsey v. N.L.R.B.,* 327 F.2d 784 (7th Cir. 1964), *cert. denied,* 377 U.S. 1003 (1964) (App. D, *infra,* pp. 28-34).

JURISDICTION.

The decision and decree of the Court of Appeals was rendered on May 9, 1969 (App. A, *infra,* p. 14). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and § 10(e) of the National Labor Relations Act, as amended,[2] 29 U.S.C. 160(e).

QUESTIONS PRESENTED.

May the National Labor Relations Board, contrary to national policy favoring arbitration, legally ignore in its discretion, an arbitration decision pursuant to a labor agreement, discharging an employee for a legitimate contractual violation, when all parties agreed to be bound by the decision in writing, no one was prohibited from stating his cause before the arbitration committee, no charge of unfairness is made or proved, and the grievance is diligently prosecuted; and, when grievance-arbitration committee has actual knowledge of other complaints of the grievant, under such circumstances, may the National Labor Relations Board impose, *sua sponte,* investigative obligations on an arbitration's procedural process and, in order to justify the Board's insertion into the grievance, to what extent is an employee's contract complaints protected concerted union activity; and, if so, how may a remedy be fashioned to preserve the integrity and validity of the arbitral process?

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[2] Referred to hereafter as the Act.

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, are as follows:

73 Stat. 525, 542-545, 29 U.S.C. 158(a)(1) *et seq.* (Section 8(a)(1)):

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;"

61 Stat. 140, 29 U.S.C. 157, *et seq.* (Section 7):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

73 Stat. 544, 29 U.S.C. 160(a) *et seq.* (Section 10(a)):

"a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *."

61 Stat. 152, 29 U.S.C. 171, (Section 201):

"That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers

and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

"(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; * * *."

61 Stat. 153, 29 U.S.C. 173(d) (Section 203):

"(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement * * *."

STATEMENT OF THE CASE.

A. BOARD PROCEEDINGS.

The John Klann Moving and Trucking Company is party to two labor agreements with Teamsters Local 407: (G.C. Ex. 4) covering operations generally beyond a 25 mile radius, and referred to as the "road" agreement, and (G.C. Ex. 5) covering operations generally within a 25 mile radius, and referred to as the "local" or "city" agreement.

The grievance machinery under the contracts has been in existence and functioning for approximately fifteen

years. The arbitration committees meet regularly twice each month; grievances are filed with the committee in advance and heard on a regular agenda the following month; all parties are notified; *and agree in writing to be bound by the decision of the committee;* no party is prohibited from saying anything and may introduce such witnesses as they wish; all proceedings are in the presence of a stenotypist and a verbatim record is made; and the procedure is the same in every case. All committees are composed of three representatives of the industry (other than the employer) and three representatives of the Union. (155a-157a.)

Trial Examiner (to General Counsel's representative):

> "Are you going to have any quarrel with the proceeding itself, that is, the method in which the proceeding was conducted?
>
> "Mr. Janetzke: No." (157a.)

The grievant and charging party, Leo Halada, in eleven years of employment as a truck driver, appeared before the Cleveland Local Grievance Committee (arbitration committee) on two occasions; both on August 4, 1966. In each instance the Union, the company, and Halada, signed the usual stipulation that they would be bound by the decision. (Resp. Ex's. 4 and 6.)

One grievance that was heard involved overtime pay claimed by Halada (See Transcript of Proceedings, Resp. Ex. 7) and the other involved Halada's discharge for overstaying his vacation. (See Transcript of Proceedings, Resp. Ex. 5.) In both cases the Vice-President of the union was chairman of the committee and in both cases Halada was physically present and participated along with his Business Representative, John Kalnicki. The overtime grievance was heard by the committee immediately before the dis-

charge case. Halada agreed that he signed the consents to be bound by the committee (125a), that "the Committee gave you every opportunity to say whatever you wanted to say, didn't they. Answer: Yes." (124a.) He also testified that he was asked "if there was nothing further the Committee will go into executive session," but he had nothing to say after that, "at that point, no." (134a.)

Halada prevailed in the first grievance hearing (overtime pay) but did not in the second (discharge). The grievance committee confirmed Halada's discharge for overstaying his vacation. Halada complained to the National Relations Board about his discharge.

The Regional Director of the National Labor Relations Board refused to issue a Complaint and Halada appealed "for my activities in using the Local Union for grievances. Also the Union did nothing in my behalf in this matter." (G.C. Ex. 1 (d).) The appeal was sustained for the reason that "dismissal of the charge on the basis of *Spielberg* (112 N.L.R.B. 1080) was unwarranted."

A complaint issued, charging violations of Section 8(a)(1) and 8(a)(3) of the Labor-Management Relations Act as amended and made no issue of the contractual grievance machinery or the *Spielberg* criteria. General Counsel felt that the Spielberg criteria were matters of "defense that a respondent may raise to an unfair labor practice charge." (154a.)

In any event, the Trial Examiner retried the discharge grievance, and much was made of an incident known as the "Florence Bar" incident. Statements were attributed to the company president which the General Counsel used as "motive."

"On August 19 or August 26, 1966" (the grievance hearing on the discharge was August 4, 1966) outside

"Florence's Bar," over objection, General Counsel's witness Wallish testified that Woidke (company President) said "I have had it up to here with him. He cost me a little money but I finally got him." Nevertheless, no witness could actually testify that the company president (Woidke) actually made the statement. It was also denied by Woidke. (48a, 49a, 53a, 68a, 176a, 185a.)

The General Counsel subpoenaed *the entire grievance committee and over objection examined them on "pretext."*

The grievance committee members testified that:

1. The same committee heard a grievance by the same grievant immediately prior to the discharge hearing and the committee was aware of it during the discharge hearing. (214a, 220a, 224a-225a, 233a, 237a.)

2. That no one was prohibited and/or inhibited from saying anything and were invited to say "anything further." (217a, 226a, 229a.)

3. That some committee members had actual knowledge of prior complaints over and above the prior grievance. (220a.)

4. That the conclusion of the committee is correct. (238a-239a.)

5. When asked if the discharge was for some other reason, not presented to the committee, such as union activity, the answer was that "pretextual discharge" is not understood. (222a.)

6. That the record reflects the accurate reason for the discharge. (219a, 229a, 233a, 234a.)

While the trial examiner found that the arbitration proceedings were "fair, just, and regular" he determined there was no contract violation. The Board modified his decision by deferring to the arbitration's interpretation of the contract but concluded that nevertheless Halada was "discharged for an unlawful reason."

"[F]or the arbitration committee was neither presented with, nor did it *sua sponte* consider, the question whether the reason advanced by Respondent for the discharge was pretextual. See *D. C. International*, 162 NLRB No. 129. We rest our conclusion that Respondent unlawfully discharged Halada upon Section 8(a)(1) of the Act, *rather than* 8(a)(3), in view of the fact that the discharge stemmed from Halada's protected concerted activity rather than his union membership or activity." (324a-325a.) (Emphasis added.)

B. THE DECISION OF THE COURT OF APPEALS.

The Court reviewed the grievant's complaint. On the two grievances that were heard by the "permanent grievance committee * * * [t]he committee first considered the overtime claim and found for Halada. On the discharge grievance, it was found that Halada had overstayed his vacation and that the company had the right under the contract to fire him." (App. A, p. 16.)

On the issue of permitting the Board "to look beyond the determination of the grievance committee" the court said, "[o]verstaying his vacation may well have been a legitimate reason to discharge Halada, as the grievance committee found, but the existence of a proper reason for a discharge is no defense if the discharge was actually made for an improper purpose." (App. A, p. 17.)

The Court went on to say that "the Board is not bound by the decision of the grievance committee."

The Court reasoned that "[t]he Board has chosen, *in its discretion*, to defer to arbitration where certain criteria are met. These criteria require that all parties agree to be bound by the arbitration, that the proceedings be fair and regular, and that the award not be repugnant to the policies of the Act." (App. A, p. 17, emphasis added.)

The Court did not feel that it was necessary to "specifically" apply "the above criteria and concluded that" it would *also* appear that the Board may look behind an arbitrator's award where the arbitrator did not consider the specific factor which results in the unfair labor practice * * *. That is precisely the situation presented here. The question of motive was not raised before the grievance committee and it made no finding on this point. Thus, the Board had the right to make its own finding on this issue." (App. A, p. 18, emphasis added.)

REASONS FOR GRANTING THE WRIT.

1. A very special and important issue is presented pertaining to the validity or futility of the arbitration of labor disputes pursuant to collective bargaining agreements and if valid or futile, under what circumstances and by what standards may they be so.

We have all the attributes of a bona fide arbitration excepting that the National Labor Relations Board, on a chance remark after the arbitration proceedings, determined that the grievance procedure was not "presented with, nor did it *sua sponte* consider" the question of pretextual discharge (App. B, *infra*, p. 20). The Court below said that while the reason "may well have been legitimate" but it is "no defense" if "actually made for an improper purpose." (App. A, *infra*, p. 17.) The Court refers to *N.L.R.B. v. Challenge-Cook Bros.*, 374 F. 2d 147 (6th Cir. 1967) but fails to distinguish between a unilateral discharge (without benefit of arbitration) as in *Challenge-Cook*, or bilateral (i.e., via union-employer binding arbitration) as in the present case.

It is conceivable how an employer may, unilaterally, discharge an employee for one reason, when, in fact, he had another reason—but it is an incredible contraction to

have no indication that the "proceedings were other than fair, just, and regular and * * * there is no evidence to indicate that the prosecution of Halada's grievance * * * was other than diligently and faithfully prosecuted," (315a) and then claim "pretext."

"Motive" should then become defensive matter in the arbitration and if not utilized by the grievant should, at the very least, dilute itself in the arbitral process or unless there is evidence that the arbitration award would be any different if "pretext" in fact, did exist. Query: Was there good reason for the grievant or the union in *not* raising the question during the arbitration?

2. The present case presents for determination a very important question of Federal law which should be settled by this Court, namely, under what circumstances must the Labor Board defer to private arbitration rather than be left to its arbitrary discretion or "hospitable acceptance." If in the arbitral process "motive" of the employer is a factor in every case, it would be a simple matter for a grievant to withhold the history of his employment, for almost all of his conduct (under Board definition) comes under the purview of protected concerted activity, and get a retrial before the Labor Board.

In *Modern Motor Express,* 149 N.L.R.B. 147 (1964) the very *same* arbitration committee in issue here, the *same* chairman, the *same* field examiner (NLRB), the *same* contracts, the *same* procedures (parties agreeing to be bound in writing, etc.) was found to be "fair and regular" and entitled to recognition by the Board.

There is no legal basis for the Labor Board to discretionally defer to or give "hospitable acceptance to the arbitral process." (*Raley's, Inc.*, 143 N.L.R.B. 256.) This leaves the arbitral process in a legal vacuum, completely

devoid of any legal propriety and labor-management peace has another unbargained for hurdle.

Even if the arbitral process were to do what the Board and Court below wanted it to do—consider "motive"—and decide on it—in effect it would be deciding on an unfair labor practice and the Board could again express its dissatisfaction with the conclusion, for one reason or another, based on Section 10(a) of the Act, i.e. imposing on the Board's jurisdiction.

The National Labor Relations Board, armed with its own definition of protected concerted activity and this lower court's application of Section 10a, may penetrate the arbitral process at will—contrary to National policy (Section 201 of the Act)—an ordination not contemplated by the Act or the courts.

The Act does not make the Labor Board the guardian of the arbitral process.

3. Nothing in the law, other than the Board's decision in this case, imposes an obligation on a fair, open, and regular arbitral process to *sua sponte* delve into the motives of the employer. "Motive" has no peculiar way of being shown or proved, particularly when the arbitration panel in this case had *notice* by hearing a grievance immediately prior to the discharge and by virtue of the fact that union representatives on the panel had personal knowledge of the grievance history. Query: Is the panel charged with knowledge of "motive"?

4. Assuming that the employer's motive constituted an unfair labor practice and assuming that the Arbitration Board had pursued the employer's motive, query: If it is an unfair labor practice in the first instance, does it become less of an unfair labor practice in the second instance or no unfair labor practice at all?

5. The court below failed to apply the Board's criteria for deferring (*Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).) and relied on *Hawkins v. N.L.R.B.*, 358 F. 2d 281, 283 (7th Cir. 1966) wherein the grievant made many complaints and no contention was made before the committee that the discharge was linked to this. The Court said "filing grievances does not immunize employees against discharge for legitimate reasons." The court below also relied on *Illinois Ruan Transport Corporation v. N.L.R.B.*, 404 F.2d 274, 280 (8th Cir. 1968)[3] which was also based on a strikingly similar factual situation as the present case, the discrimination discharge lacked "substantial evidentiary support."

The court below also relied on *N.L.R.B. v. Auburn Rubber Company*, 384 F.2d 1, 3 (10th Cir. 1967) in a section 8(a)(2) violation being upheld where *the union and the company agreed* not to submit that particular issue to arbitration. This is not the question here. In the same case, involving a section 8(a)(1) violation the court said where "[f]ull opportunity was afforded for the presentation of all pertinent evidence" the Board "abused its discretion and acted contrary to its established policies in upholding the 8(a)(1) charges." This is our situation and appears to be in conflict.

The court below also refers to *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964) which enhances the value of arbitration rather than diminishes it, and then relies on *Ramsey v. N.L.R.B.*, 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964), where the grievant was neither notified nor did he participate in

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[3] The court here said that "[t]he record is barren of any evidence that any of Adam's complaints or suggestions had any support from any fellow employees in the Union." (p. 276.) This is precisely our situation.

the arbitration, the Board, nevertheless, deferred and the court affirmed following *Carey v. Westinghouse, supra,* in that the petitioner was "fully and adequately defended" and no "other procedural irregularity, fraud or collusion entered into the arbitrator's decision." This also appears to be in conflict with our case.

6. This Court, in the Steelworkers Trilogy, has established, unequivocally, that "arbitration is the substitute for industrial strife," that it "is part and parcel of the collective bargaining process" and that the labor agreement "calls into being a new common law—the common law of a particular industry * * *." *United Steel Workers of America v. Warrior and Gulf Navigation Company,* 363 U.S. 574 (1960). "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the Agreement," without regard to merit. *United Steel Workers of America v. American Manufacturing Co.,* 363 U.S. 564 (1960). "Arbitrators have no obligation to the court to give their reasons for an award." Review of an arbitrator's decision would make it meaningless, "for in reality it would almost never be final." *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593 (1960). Should the same principles apply to the National Labor Relations Board?

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD S. GOLDFARB,
Attorney for Petitioner.

June 1969.

APPENDIX A.

OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS.

No. 18,670.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

THE JOHN KLANN MOVING AND TRUCKING COMPANY, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	ON PETITION for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

(Decided May 9, 1969.)

Before: WEICK, Chief Judge, and PHILLIPS and COMBS, Circuit Judges.

COMBS, Circuit Judge. This case is before us on the John Klann Moving and Trucking Company's petition for review of an order of the National Labor Relations Board. The Board requests enforcement. The company was found in violation of Section 8(a)(1) of the Act by discharging employee Leo Halada for engaging in protected activity. The Board's decision and order are reported at 170 N.L.R.B. No. 133.

Petitioner's employees, including Leo Halada, were represented by the Truck Drivers Union, Local 407 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The collective bargaining agreement contained a procedure for the settlement of grievances. Under the contract, grievances were first considered at a local level and, if not resolved, then

were heard by a permanent grievance committee composed of three company and three union representatives. The committee could dispose of the grievance by majority vote.

Halada was an employee of eleven years' standing with a good work record. In April, 1964, he first used the grievance machinery to register a complaint against petitioner, charging that the company was not complying with the overtime and vacation pay provisions of the contract. Company president Charles Woidke responded by calling a meeting of the drivers who would be affected by the resolution of Halada's grievance. Woidke told the men that the company could not afford literal compliance with the contract, and, if it was enforced, they would have to lay over at various places at night instead of completing their runs on the same work day. A vote was then taken, and only Halada voted for adherence to the contract.

Soon thereafter, Halada was taken off his regular run and he filed a grievance on this. In November, 1964, he filed three more grievances, all relating to his seniority and the general prerequisites of seniority. At least two of these grievances were remedied. About this same time, Halada was assigned overnight trips without receiving the customary advance notice. On his complaint to the union, the overnight trips ceased.

During the following months, Halada frequently complained to union officials that the company was not complying with the overtime or vacation pay provisions of the contract. In April, 1965, he filed another grievance on these items. President Woidke called another meeting of the drivers at which he referred to Halada as "our trouble-making friend." Woidke repeated his previous statement about overnight lay-overs if the contract was adhered to, and again the drivers expressed satisfaction with the existing arrangement.

In early 1966, Halada again complained to the union about the overtime and vacation pay issues. Then in March, 1966, Halada and another employee were summoned to a private meeting with Woidke. As a result of this meeting an understanding was reached that Halada would be paid at the contract rate for vacations and that he would make short, local runs most of the time. After this agreement, Halada received time and one-half for overtime on his occasional long distance runs. However, in June, 1966, he filed another grievance, complaining that he had not received all the overtime pay due him.

The company posted its vacation schedule in June, 1966. When Halada saw that he was listed for a three-week vacation, he complained to Woidke that he was entitled to eighteen work days. According to Halada, Woidke agreed that he should have as vacation eighteen work days plus two additional days. Halada went on vacation in July and before his return received a notice from Woidke that he had overstayed his vacation by three days and that he was fired. He then filed a grievance about being fired.

The permanent grievance committee heard Halada's last two grievances, one about overtime and one about being fired, on the same day. The committee first considered the overtime claim and found for Halada. On the discharge grievance, it was found that Halada had overstayed his vacation and that the company had the right under the contract to fire him.

Shortly after the committee upheld Halada's discharge, Woidke was talking to several men at a local bar. When Halada's name was mentioned, Woidke, placing his hand to his forehead, said he had had it "up to here" with Halada and that, "He cost me a little money, but I finally got him."

An unfair labor practice charge was filed. The Board found that the grievance committee looked only to the contractual basis for Halada's discharge and had not considered the company's motive. Turning to this question, it found that the vacation issue had been only a pretext and that the real reason for the discharge was Halada's militance in pressing grievances.

Only two questions are presented on appeal: (1) are the Board's findings supported by substantial evidence, and (2) was the Board permitted to look beyond the determination of the grievance committee.

Clearly, the Board's finding that Halada was fired for pressing grievances is supported in the record. The evidence, as outlined above, not only permits but strongly suggests the inference that Halada's extended vacation was merely a pretext for discharging him. Overstaying his vacation may well have been a legitimate reason to discharge Halada, as the grievance committee found, but the existence of a proper reason for a discharge is no defense if the discharge was actually made for an improper purpose. *N.L.R.B. v. Challenge-Cook Bros.*, 374 F.2d 147 (6th Cir. 1967).

It is equally clear that the Board is not bound by the decision of the grievance committee. Section 10(a) of the Act provides, inter alia, that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

The Board has chosen, in its discretion, to defer to arbitration where certain criteria are met. These criteria require that all parties agree to be bound by the arbitration, that the proceedings be fair and regular, and that the award not be repugnant to the policies of the Act. *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964);

N.L.R.B. v. Auburn Rubber Co., 384 F.2d 1 (10th Cir. 1967); *Ramsey v. N.L.R.B.*, 327 F.2d 784 (7th Cir. 1964), *cert. denied*, 377 U.S. 1003 (1964); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

Without specifically applying the above criteria, it would also appear that the Board may look behind an arbitrator's award where the arbitrator did not consider the specific factor which results in the unfair labor practice. *Hawkins v. N.L.R.B.*, 358 F.2d 281 (7th Cir. 1966). See also *Illinois Ruan Transport Corporation v. N.L.R.B.*, 404 F.2d 274 (8th Cir. 1968). That is precisely the situation presented here. The question of motive was not raised before the grievance committee and it made no finding on this point. Thus, the Board had the right to make its own finding on this issue.

Enforcement granted.

ORDER OF THE SIXTH CIRCUIT COURT OF APPEALS.

(Filed May 9, 1969.)

BEFORE: WEICK, *Chief Judge*, PHILLIPS and COMBS, *Circuit Judges.*

On petition to review and cross-petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that enforcement of the order of the National Labor Relations Board is hereby granted.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

APPENDIX B.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Filed April 9, 1968.)

On August 15, 1967, Trial Examiner John G. Gregg issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

We agree with the Trial Examiner that Respondent unlawfully discharged employee Leo Halada. Halada, who had worked for Respondent for more than 11 years, was discharged on July 28, 1966, ostensibly for overstaying his 3-week vacation by 3 days. Like the Trial Examiner, we are satisfied that the real reason Respondent discharged Halada was the latter's militance in pressing grievances and in insisting on compliance by Respondent with various contract provisions. Respondent's true motive is demon-

strated by its insistence on the "letter of the law" with respect to Halada; President Woidke's statements at Florence's Bar[1] that he "had it up to here with Leo [Halada] * * *. He cost me a little money but I finally got him;" and the improbability of any employer summarily discharging a competent employee of 11 years standing for returning 3 days late from a 3-week vacation, as Respondent claims.

We note that the Trial Examiner found, in disagreement with the apparent view of the arbitration committee, that Halada had a contractual right to the 3 days. Because of the deference the Board normally accords to an arbitrator's interpretation of a contract, we do not adopt, or rely upon, the Trial Examiner's finding in this specific respect. We nevertheless remain satisfied on the strength of the other credited evidence, which we find was properly considered, that there is ample record support for the conclusion that Halada was actually discharged for an unlawful reason. We agree with the Trial Examiner that the award of the arbitration committee does not preclude our consideration of whether Halada was discriminatorily discharged, for the arbitration committee was neither presented with, nor did it *sua sponte* consider, the question whether the reason advanced by Respondent for the discharge was pretextual. See *D. C. International,* 162 NLRB No. 129. We rest our conclusion that Respondent unlawfully discharged Halada upon Section 8(a)(1) of the Act, rather than 8(a)(3), in view of the fact that the discharge stemmed from Halada's protected concerted activity rather than his union membership or activity.

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[1] Although not appearing in the Trial Examiner's Decision, the record reveals that the incident at Florence's Bar occurred on August 29, approximately 1 month after Halada's discharge.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that Respondent, The John Klann Moving and Trucking Company, Cleveland, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. Apr. 9, 1968.

FRANK W. MCCULLOCH,
Chairman,

HOWARD JENKINS, JR.,
Member,

SAM ZAGORIA,
Member,

National Labor Relations Board.

APPENDIX C.

CONFLICTING DECISION OF THE TENTH CIRCUIT.

(384 F. 2d 1.)

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AUBURN RUBBER COMPANY, INC.,

Respondent.

No. 9177.

United States Court of Appeals
Tenth Circuit.

Sept. 8, 1967.

On petition for enforcement of an order of the National Labor Relations Board, the Court of Appeals, Breitenstein, Circuit Judge, held that although discharge of employees who had supported competing union was submitted to arbitrator, and arbitrator determined that discharges were not discriminatory, in view of fact that employees were represented at arbitration hearing by union which had contract with employer and to which they were antagonistic, and in view of fact that the employees had relied on previously filed unfair labor practice charges and had declined to appear at arbitration hearing with their own counsel, the board did not abuse its discretion in determining that employees had been discriminatorily discharged.

Enforcement denied on one of charges, and granted on other charges.

Before WILBUR K. MILLER,* BREITENSTEIN and HILL, Circuit Judges.

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* Of the District of Columbia Circuit, sitting by designation.

BREITENSTEIN, Circuit Judge.

The National Labor Relations Board petitions for the enforcement of an order issued against respondent Auburn Rubber Company.[1] The prime issue is whether an arbitration award bars Board action.

Auburn makes rubber and plastic products at Deming, New Mexico. It was financed by a $15,000,000 bond issue of the village of Deming. Three million dollars of these bonds were issued to a joint employer-union pension fund in which all participating employers have contracts with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. After the plant opened, the United Rubber, Cork, Linoleum and Plastic Workers of America and the Teamsters both sought to organize the employees. The Teamsters were certified by the Board and made a contract with the Company for a term expiring December 31, 1962. The contract proved unsatisfactory and on May 14, 1962, the Company and the Teamsters entered into a new contract which ran until May 14, 1964.

In the fall of 1962, the Rubber Workers filed a representation petition. Subsequently, the Board held that the rewritten agreement with the Teamsters did not bar an election because it was a premature extension of an earlier agreement, and ordered an election. About this time some of the employees formed the Deming Employees Association. The Board denied the Association a place on the ballot. The results of the February 27 election were inconclusive.[2] On March 7, the Teamsters presented to the Board charges of unfair labor practices by the Company.

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[1] The Board's decision and order are reported at 156 N.L.R.B. 301.

[2] The results were: Rubber Workers, 93; Teamsters 67; neither union, 46.

A similar complaint filed by the Rubber Workers was later withdrawn.

In April, the Teamsters brought suit in the United States District Court for the District of New Mexico to require the Company to perform the 1962 contract which the Board held was no bar to the election. The original complaint in the instant proceedings was filed on August 6, 1963, by the General Counsel. A few days later, the federal court in New Mexico ordered the Company to perform the contract. The Company and the Teamsters then agreed to arbitrate certain issues including a number of discharges. The arbitrator held prolonged hearings and in March, 1964, made an award which was approved by the court. Thereafter an amended complaint was filed by the General Counsel before the Board. A hearing was held in April, 1965. The examiner found that the Company had violated § 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), by interrogating employees concerning their membership in, and sympathies for, the Rubber Workers or the Teamsters and by making promises and threats. He also found that the Company had violated § 8(a)(2), 29 U.S.C. § 158(a)(2), by participation in the organization and operation of Deming Employees Association. In addition he found that the Company had violated § 8(a)(3), 29 U.S.C. § 158(a)(3), by the discriminatory discharge of six employees because of membership in the Rubber Workers. He held that the six discriminated against should be reinstated with back pay. The Board affirmed with one member dissenting on the ground that binding effect should be given the arbitrator's determination "that the alleged discriminatees were discharged for cause."

No good purpose would be served in reviewing the evidence with more detail. We believe that it is sufficient

to sustain the findings and decision of the Board. The question is whether the arbitration award bars Board action.

[1, 2] The United States Supreme Court has recognized the value of arbitration in the maintenance of industrial peace.[3] In *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270-271, 84 S.Ct. 401, 408, 11 L.Ed.2d 320, the Court said: "the Board shows deference to the arbitral award, provided the procedure was a fair one and the results were not repugnant to the Act." The Board, in *Spielberg Manufacturing*, 112 N.L.R.B. 1080, 1082, announced the policy of honoring arbitration awards when "fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." In our opinion the Board has the discretion to defer to, or to reject, the decision of the arbitrator[4] and, in determining whether that discretion has been properly exercised, the tests announced by Spielberg are pertinent.

[3] With regard to the § 8(a)(1) interference charges the position of the examiner, upheld by the Board, was that the written agreement to arbitrate did not cover such charges. Although they were not specifically mentioned in that agreement, they were among the issues presented to the arbitrator by the Teamsters and the Company. Full opportunity was afforded for the presentation of all pertinent evidence. The arbitrator decided in favor

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[3] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564; 80 S.Ct. 1343, 4 L.Ed.2d 1403; *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L. Ed.2d 1424.

[4] See *Ramsey v. National Labor Relations Board*, 7 Cir., 327 F.2d 784, 787, certiorari denied 377 U.S. 1003, 84 S.Ct. 1938, 12 L.Ed.2d 1052.

of the Company. The attorney for the Teamsters joined with the attorney for the Company in submitting the arbitrator's award to the court with the request that it be adopted by the court. In our opinion all the Spielberg tests have been met. The award was fair and the result is not repugnant to the Act. The unfair labor charge was filed with the Board by the Teamsters. The incongruous result of the Teamsters' acquiescence in the arbitration award and of Board action to the contrary on the behest of the Teamsters should be avoided. The situation is not changed by the finding of discriminatory discharges because they were for activities related to the Rubber Workers—not to the complaining Teamsters. We believe that the Board abused its discretion and acted contrary to its established policies in upholding the § 8(a)(1) charges.

[4] The situation is different so far as the § 8(a)(2) violation pertaining to the Deming Employees Association is concerned. At the hearing before the arbitrator, the attorney for the Teamsters stated that this matter was not submitted for arbitration. The Company accepted this position. The matter was properly presented to and decided by the Board. Its findings of Company participation in the organization and operation of the Association are sustained by substantial evidence on the record as a whole.

[5] The real controversy centers in the § 8(a) (3) charges. The Board found that six employees had been discharged discriminatorily because of their activities on behalf of the Rubber Workers and ordered reinstatement with back pay. In the arbitration proceedings the Teamsters presented a number of claims of improper discharges. Included therein were the six in question. These employees were members of the Teamsters because the contract between the Teamsters and the Company con-

tained a union membership clause with a check-off provision. The Teamsters notified the six of the arbitration hearings. They were given an opportunity to appear with their own counsel but declined to do so. The Rubber Workers also chose not to appear in the arbitration because they were not parties to the underlying agreement. Thus, we have a situation in which the six discriminatees were represented at the arbitration by a union to which they were antagonistic. They preferred to have their rights determined by the Board. The arbitrator, relying on the evidence presented by the Company, held that the discharges were not discriminatory.

At the hearing before the examiner the six testified as to the circumstances surrounding their discharges. The Company relied on the transcript of the evidence taken by the arbitrator. In regard thereto the examiner stated that he could not determine the credibility of witnesses from the transcript. In his decision the examiner found that all six discriminatees were credible witnesses. Their testimony sustains the examiner's findings that they were discharged because of activities for the Rubber Workers.

In our opinion it would be unfair and repugnant to the Act to bind the six discriminatees to the arbitrator's award. They relied on the previously filed unfair labor practice charges, and their representation at the arbitration hearings was by a union other than the competing union in whose behalf they incurred the displeasure of the Company.

Enforcement is denied on the § 8(a) (1) charge and is granted on the § 8(a) (2) and § 8(a) (3) charges.

APPENDIX D.

CONFLICTING OPINION OF THE SEVENTH CIRCUIT.

(327 F.2d 784.)

THOMAS D. RAMSEY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 14226.

United States Court of Appeals, Seventh Circuit.

Feb. 12, 1964.

Proceeding on petition for review of order of National Labor Relations Board dismissing employee's unfair labor practice complaint. The Court of Appeals, Hastings, Chief Judge, held that board's deference to an arbitration award that had been arrived at through the arbitration machinery provided under the collective bargaining agreement did not constitute an abuse of the board's discretion.

Affirmed.

Before HASTINGS, Chief Judge, and DUFFY and CASTLE, Circuit Judges.

HASTINGS, Chief Judge.

Petitioner, Thomas D. Ramsey, seeks review of an order of the National Labor Relations Board issued September 25, 1962. This order dismissed petitioner's unfair labor practice complaint which charged discrimination, restraint and coercion in violation of sections 8(b) (1) (A), 8(b) (2), 8(a) (1) and 8(a) (3) of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C.A. §§ 151 et seq. The Board's decision is reported in *International Harvester Co., Indianapolis Works*, 138 N.L.R.B. 923 (1962).

Petitioner began employment with International Har-

vester Company at Indianapolis, Indiana on February 10, 1942.

On September 16, 1955, the company executed a collective bargaining agreement with Local Union 98 of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO,[1] for a term which expired August 1, 1958. The agreement contained a union security provision which required employees, as a condition of employment, to join the union and pay an initiation fee and periodic dues. There was a provision for checkoff of dues.

Petitioner joined the union "under protest" and authorized the company in writing to deduct periodic dues from his wages.

In 1957, the Indiana General Assembly enacted a Right to Work Law, Ind. Ann. Stat. §§ 40-2071 through 40-2706 (Burns' Supp.), which made it unlawful to condition employment upon membership in a labor organization.

On April 29, 1958, petitioner sent a letter by registered mail to the company and the union. The second paragraph of this letter stated, "I request, no deduction be made from my pay except that which is a condition of employment. If at any time such condition ceases to exist, by law or otherwise, I request my release from membership in Local No. 98."

The company interpreted this letter as a request to cancel petitioner's checkoff authorization. Copies of a memorandum to this effect were sent by the company to petitioner and the union. The company did not deduct petitioner's union dues from his wages in May, 1958, and thereafter.

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[1] The union filed a brief in support of the Board's order in this appeal by leave granted by the court.

On July 1, 1958, the union certified to the company that petitioner was more than sixty days in arrears in payment of his dues and requested "that the appropriate action be taken against" petitioner.

Under the contract, no action could be taken against petitioner if he paid his dues within ten working days after the union certified him as delinquent. Petitioner was not informed of the union's certification of delinquency and did not pay the delinquent dues within the ten day period or thereafter.

On July 21, 1958, the union filed a grievance with the company, charging that the company had violated the contract by not discharging petitioner.

On August 6, 1958, five days after expiration of the collective bargaining contract, the company rejected the union's grievance on two grounds. The company stated that due to expiration of the contract, the union security provisions were inoperative under the Indiana Right to Work Law. Also, that an Indiana circuit court order prohibited it from enforcing the union security provisions of the contract.[2]

On August 22, 1958, the union certified its grievance of July 21, 1958, to formal arbitration pursuant to the provisions of its labor agreement with the company. Peti-

[2] This order was entered in the case of *Snavely et al. v. International Harvester Company* (unreported). The case involved the company's Fort Wayne, Indiana plant. The Fort Wayne plant was governed by the same collective bargaining agreement as the Indianapolis plant. The court held the union security provisions to be null and void and unenforceable under Indiana's Anti-Injunction Act of 1933, Ind.Ann.Stat §§ 40-501 et seq. (Burns'). This case was pending on appeal when the company rejected the union's grievance. Also, the Appellate Court of Indiana had found contrary to the Snavely case and held that the Anti-Injunction Act did not invalidate the union shop. *Smith, etc. v. General Motors Corp., et al.*, 128 Ind.App. 310, 143 N.E.2d 441 (1958).

tioner was not given notice of the arbitration proceeding and did not participate therein. The arbitrator found that the company should have discharged petitioner. However, due to the Indiana Right to Work Law, the arbitrator, with the union's consent determined petitioner should be regarded as having been re-employed on August 1, 1958, the date the contract expired.

As a result of the arbitrator's decision petitioner's seniority was reduced and he was laid off work from August 22, 1960 until April 17, 1961, as a result of an economic reduction in the labor force.

Petitioner filed an unfair labor practice complaint with the National Labor Relations Board. The trial examiner found that the company and union had discriminated against petitioner in violation of the Act. The recommended order would restore petitioner's seniority with back pay.

On appeal, the Board rejected the trial examiner's recommended order and dismissed petitioner's complaint. It held with two members dissenting, that while it had jurisdiction to determine whether unfair labor practices occurred, the policies and purposes of the Act would be better effectuated by honoring the arbitration award. International Harvester Co., Indianapolis Works, 138 N.L.R.B. 923, 929 (1962).

The issues presented to this court are whether the Board has the discretion to defer to the decision of an arbitrator rather than determine the merits of an unfair labor practice complaint and if the Board does have such discretion whether it abused it in this case.

[1] A primary purpose of national labor relations laws is that of settling labor problems by means of collective bargaining. An increasingly recognized and important policy, as a vital part of the collective bargaining

process, is encouragement of arbitration. We recognized and approved this policy in *Local Union No. 702, etc. v. Central Ill. Pub. Serv. Co.*, 324 F.2d 920, 923 (7 Cir. 1963). See *United Steelworkers of America v. Warrior & Gulf Co.*, 363 U. S. 574, 80 S.Ct. 1347, 4 L. Ed.2d 1409 (1960).

The Supreme Court recently carried this policy one step further in *Carey v. Westinghouse Elec. Corp.*, 84 S.Ct. 401. There, two unions represented employees of the respondent employer. One union had been certified as the exclusive bargaining representative for "all production and maintenance employees." The other union was certified as the exclusive bargaining representative for "all salaried, technical" employees. The union representing the production and maintenance employees filed a grievance with the employer, asserting that certain employees represented by the technical employees' union were performing production and maintenance work.

A collective bargaining agreement between the union and respondent contained a grievance procedure for the use of arbitration in case of unresolved disputes, including those involving the "interpretation, application or claimed violation" of the agreement.

The employer refused to arbitrate on the ground that the controversy presented a representation matter for the National Labor Relations Board.

The union petitioned the Supreme Court of New York for an order compelling arbitration. From a refusal by that court and an affirmance by the Applleate Division, 15 A.D.2d 7, 221 N.Y.S.2d 303, the union appealed to the New York Court of Appeals, which affirmed, holding that the matter was within the exclusive jurisdiction of the Board since it involved a definition of bargaining units. 11 N.Y.2d 452, 230 N.Y.S.2d 703, 184 N.E.2d 298.

On certiorari, the Supreme Court reversed, quoting

extensively from the Board's opinion in the instant case. The Court stated, "If by the time the dispute reaches the Board, arbitration has already taken place, the Board shows deference to the arbitral award,[7] provided the procedure was a fair one and the results not repugnant to the Act. As the Board recently stated:

> " 'There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.
>
> " 'The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.' International Harvester Co., 138 N.L.R.B. 923, 925-926." Id. at 408 of 84 S.Ct.

In footnote 7 in the preceding excerpt from *Carey*, the Supreme Court again pays tribute to the Board holding in the instant case by citing with approval the language of the Board in another case following International Harvester. See *Raley's, Inc.*, 143 N.L.R.B. No. 40, quoted from therein.

[2] Thus, the Supreme Court has held that the Board has the discretion to defer to the decision of an arbitrator. Our function in reviewing such cases is to determine whether the Board abused its discretion in so deferring.

The Board laid down the standards it would apply in determining whether or not to defer to an arbitrator's decision, in its opinion in the present case:

> "If complete effectuation of the Federal policy is to be achieved, we firmly believed that the Board, which is entrusted with the administration of one of the many facets of national labor policy, should give hospitable acceptance to the arbitral process as 'part and parcel of the collective bargaining process itself,' and voluntarily withhold its undoubted authority to adjudicate alleged unfair labor practice charges involving the same subject matter, unless it clearly appears that the arbitration proceedings were tainted by fraud, collusion, unfairness, or serious procedural irregularities or that the award was clearly repugnant to the purposes and policies of the Act." *International Harvester Co., Indianapolis Works*, 138 N.L.R.B. 923, 927 (1962).

[3] Petitioner contends, *inter alia*, that his rights were denied since he was not given notice of the arbitration hearing and did not appear there. We disagree. There is no statutory or constitutional right of an employee to be present at an arbitration hearing. It appears that the company fully and adequately defended petitioner's position at the hearing.

Petitioner does not contend that any other procedural irregularity, fraud or collusion entered into the arbitrator's decision.

We need not consider other contentions of petitioner, since we find Carey to be dispositive of this appeal.

We hold that the Board did not abuse its discretion in deferring to the decision of the arbitrator.

The Board's order dismissing petitioner's complaint and deferring to the award of the arbitrator is affirmed.

Affirmed.